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No. 81-2217

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

BETTY S. RACER, *et al.*,
Appellants,

v.

JOHNSON & JOHNSON, a corporation,
Appellee.

On Appeal from the Missouri Court of Appeals,
Eastern District

MOTION TO DISMISS

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Appellee, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves that this appeal be dismissed on the grounds that it is not within the jurisdiction of this Court and that it does not present a substantial federal question.

Appellants seek to bring before this Court the issue whether, as a matter of federal constitutional law, a state court may refuse to permit execution on a portion of a judgment pending disposition of the entire case. Here, the Missouri Court of Appeals has simply held that under traditional procedural rules, Appellants' judgment on a jury verdict for actual damages is not final until their still-pening claim for punitive damages has been disposed of. This Court does not have jurisdiction of Appellants' attempted appeal for four independent reasons:

1. Under 28 U.S.C. §1257, this Court has appellate jurisdiction over state court rulings which constitute "final judgments or decrees." Appellants' very complaint here is that the Missouri courts have not recognized their actual damage award as a final judgment. This is simply a matter of state law interpretation by the Missouri courts, and thus the admitted absence of finality dooms the attempted appeal.

2. Section 1257(2) is limited in its terms to final state court judgments sustaining "the validity of a statute of any state" which has been challenged on constitutional grounds. No state statute is involved in this case. The Missouri courts have simply applied well-accepted jurisprudential and procedural concepts to this case in ruling that a verdict for actual damages does not constitute a final judgment as long as the punitive damage claim remains pending.

3. No substantial federal question is presented by this would-be appeal. The suggestion that Appellants are being denied due process and equal protection by not being permitted to execute on their actual damage verdicts until the conclusion of the case borders on the frivolous. The well-established policy of the avoidance of piece-meal litigation and the universal acceptance of the final judgment rule are answers enough to Appellants' constitutional arguments.

4. At no time during the proceedings in the Missouri courts did Appellants ever attempt to raise any federal consitutional issues. None of the papers filed in the Missouri Court of Appeals or in the Missouri Supreme Court by Appellants made any mention of the due process or equal protection questions which they now ask this Court to review. Thus, Appellants are also in violation of the requirement that the federal constitutional questions must be raised and preserved at the earliest practicable time in the state proceedings. Here, the issue posed by Appellant's Jurisdictional Statement was not timely and properly raised and was not passed on by the Missouri Courts.

CONCLUSION

For the reasons stated, this appeal should be dismissed for want of jurisdiction or, the alternative, for want of a substantial federal question.

Respectfully submitted,

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